

**United States Department of Labor
Employees' Compensation Appeals Board**

R.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
North Little Rock, AR, Employer**

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**Docket No. 11-976
Issued: November 23, 2011**

Appearances:

*James W. Stanley, Jr., Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 9, 2011 appellant, through his attorney, filed a timely appeal of a December 17, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed between the most recent merit decision of July 2, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit issue in this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim, pursuant to 5 U.S.C. § 8128(a) of FECA.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 22, 2003 appellant, then a 29-year-old health technician, sustained a lower back injury while turning a patient. OWCP accepted her claim for lumbar strain.²

On November 10, 2004 Dr. Derek Lewis, a Board-certified family practitioner and treating physician, placed appellant off work. On February 28, 2006 OWCP denied a claim for recurrent disability beginning August 9, 2005. On September 19, 2008 it denied appellant's claim for total disability from October 12, 2007 to January 2, 2008. On April 16, 2010 OWCP received a Form CA-7 requesting compensation for intermittent periods of disability compensation for the period March 28 to July 22, 2005.

In a letter dated May 5, 2010, OWCP informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days. It noted that it had processed 42 hours of leave without pay for the period April 6 through July 22, 2005 and would process the 2.25 hours claimed for April 4, 2005 in a separate payment. OWCP noted that the remaining dates were not supported by medical evidence and could not be processed. The remaining 2005 dates included: March 28 (4 hours); April 18 (8 hours); May 18 (3 hours); May 26 (2 hours); May 31 (2 hours), June 7 (3.5 hours); June 21 (2 hours); and June 23 (2 hours). OWCP noted that on June 16 and July 19, 2005, appellant had a medical appointment but was not totally disabled, thus she was paid four hours each for those two dates.

Appellant continued to submit new medical evidence pertaining to treatment received in 2010; however, she did not submit any medical evidence pertaining to the aforementioned periods.

By decision dated July 2, 2010, OWCP denied appellant's claim for wage-loss compensation for the period March 29 to July 22, 2005.

OWCP received several reports dated December 17, 2009, April 8, 13, June 21, July 22 and August 30, 2010 from Dr. William E. Ackerman, III, Board-certified in anesthesiology and pain medicine and a treating physician, who diagnosed spondylosis of the cervical and lumbar spine, sprain/strain of the cervical and lumbar spine and performed lumbar epidural steroid injections. It also received from Dr. Ackerman a July 21, 2010 prescription for a walker and a September 3, 2010 prescription for a cane.

On July 13, 2010 appellant's representative requested a hearing. He subsequently requested that the hearing request be withdrawn and asked that OWCP reconsider the claim on the record.

² The record reflects a prior claim for a lumbar strain. On June 13, 2002 appellant, sustained a right lower back injury while assisting a falling patient. OWCP accepted her claim for lumbar strain. The record reflects that appellant was off work for two weeks and returned to sedentary duty. Appellant was pregnant at the time of the injury. The two claims have been administratively combined.

In a letter dated August 17, 2010, counsel indicated that appellant had sent in proof of her medical disability for the dates in question. On November 8, 2010 he requested that OWCP rule on the request for reconsideration.

By decision dated December 17, 2010, OWCP denied appellant's request for reconsideration without a review of the merits of the claim finding that the evidence submitted was insufficient to warrant further review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,³ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁵

ANALYSIS

Appellant disagreed with the denial of her claim for intermittent periods of disability compensation for the period March 28 to July 22, 2005. The underlying issue is whether she submitted sufficient medical evidence to establish that she was disabled on various dates within the period March 28 to July 22, 2005. Appellant did not provide any new relevant or pertinent medical evidence on the issue of whether she was disabled for those periods.

On reconsideration, counsel submitted a letter dated August 17, 2010 in which he advised OWCP that appellant had sent in proof of her medical disability for the dates in question. No medical evidence was submitted for the intermittent periods of disability in 2005. Since, as noted, the underlying issue is medical in nature, this letter is not relevant as counsel merely expressed his belief that appellant had sent in the requested documentation. The submission of

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ *Id.*

evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁶

OWCP also received several reports and treatment records from Dr. Ackerman dating from December 17, 2009 to August 30, 2010 and prescriptions for a cane and a walker. The Board notes that this evidence from 2009 and 2010 is not relevant to the issue of whether appellant was disabled on the claimed dates in 2005. In none of these documents does Dr. Ackerman offer an opinion on disability during that time.⁷ Appellant did not provide any relevant and pertinent new medical evidence supporting disability for the period March 28 to July 22, 2005. Consequently, the evidence submitted by her on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted.

For these reasons, OWCP properly denied her request for reconsideration without conducting a merit review of the claim.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

⁶ *Robert P. Mitchell*, 52 ECAB 116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board